

CARL C. WEBSTER
Claimant

CORBIN FISH FARM
Respondent

FARMERS INSURANCE EXCHANGE
Insurance Carrier

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The Administrative Law Judge (ALJ) denied claimant's request for preliminary hearing benefits without stating a reason for the denial. Claimant appeals and argues, in his brief, that his testimony and the medical records admitted into the preliminary hearing

record prove he injured his low back on May 28, 1997, while working for the respondent. The claimant contends his low back continues to be symptomatic and he is in need of medical treatment and all past outstanding medical bills should be ordered paid as authorized medical.

In contrast, respondent requests the Appeals Board (Board) to affirm the ALJ's preliminary hearing Order that denied claimant's request for preliminary hearing benefits. Respondent argues claimant failed to prove his low back condition is a result of an accidental injury that arose out of and in the course of his employment with respondent. Furthermore, respondent contends, if claimant's low back condition resulted from carrying a heavy air conditioner at work, then the injury is not compensable because respondent specifically prohibited claimant from that work activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Board finds the ALJ's preliminary hearing Order should be affirmed.

Claimant commenced working for the respondent in June 1996, performing general farm work on respondent's catfish farm. His specific job duties consisted of seining the fish out of the ponds, picking up 45 to 65 pound buckets of fish, feeding the fish, working at the counter answering the telephone and collecting money charged customers who fished in the stocked ponds.

Claimant alleges he injured his low back on or about May 28, 1997, while lifting and carrying a heavy window air conditioner while working for the respondent. Claimant testified at the July 9, 1998, preliminary hearing that he did not notice any immediate pain or discomfort in his back but did notice discomfort later in the work day. Claimant, however, testified at the June 1, 2000, preliminary hearing he did not have any discomfort in his back until he got out of bed the next morning.

Claimant notified the respondent of his back problem and respondent's owner's wife, Mrs. Corbin, made an appointment with LakePoint Medical Office in Augusta, Kansas. Mrs. Corbin also drove the claimant to the appointment and the medical records indicate claimant was seen on June 2, 1997, by Douglas A. Swim, a physician assistant. Claimant provided Mr. Swim with a history of picking up and carrying an air conditioner on May 28, 1997, while working for the respondent. Claimant further indicated he did not have any pain and discomfort until the following morning.

Mr. Swim's assessment was lumbar strain bilaterally and essential hypertension. Claimant was treated with ultrasound on the first visit and was instructed for a follow up ultrasound treatment the next day. Claimant also was placed on pain and anti-inflammatory medications. Respondent provided medical treatment for claimant by first

directly paying for the treatment and then through its workers compensation insurance carrier through July 22, 1998. At that time, respondent's workers compensation insurance carrier denied any further medical treatment and discontinued temporary total disability compensation payments after two weeks.

Claimant continued conservative medical treatment for his low back condition through physician's assistant Mr. Swim under the direction of Marie Hand, M.D. and then under the direction of Michael Rausch, M.D. until January 18, 2000. Claimant, however, was very noncompliant with the prescribed conservative treatment. On numerous occasions, claimant failed to show for appointments with Mr. Swim, failed to show for appointments for x-rays and failed to attend regular appointments for physical therapy.

Mr. Swim referred claimant for a second opinion to neurosurgeon Paul S. Stein, M.D., in Wichita, Kansas. Dr. Stein saw claimant on October 27, 1999. After examining the claimant and reviewing claimant's medical treatment records, Dr. Stein suspected a chronic lumbar strain and recommended claimant undergo an MRI scan to determine if there was any evidence of neural compression.

The last medical note contained in the preliminary hearing record is a note from claimant's current primary physician Leslie E. F. Page, D.O. That note is dated May 2, 2000, and indicated Dr. Page's impression was that claimant's physical symptoms suggested deterioration of his lumbar discopathy and further diagnostic testing was needed as soon as possible.

At the time claimant saw Dr. Stein on October 27, 1999, he had pain in his low back and pain radiating down into his left lower extremity. The May 2, 2000, note from his present primary physician Dr. Page indicated claimant had increased pain, lower extremity parathesis, erectile dysfunction and problems with his bowel movements. Although claimant has continued to claim that he had increased symptoms in his low back and legs since the alleged May 27, 1998, accident, claimant testified he did not miss any work while he was employed by the respondent. Also, he continued to perform manufacturing type of work at the time he last testified on June 1, 2000.

During the time that claimant was treated conservatively by Mr. Swim, he was taken off work on May 18, 1999, until released from Mr. Swim's care. At the time of the first preliminary hearing held on July 9, 1998, claimant testified he remained working for the respondent but was not performing any physical type labor as he was only answering the telephone, taking orders, and collecting money charged customers who were fishing in the stocked ponds. But respondent's insurance carrier hired an investigator who also testified at the preliminary hearing. The investigator had taken a videotape of claimant's work activities on July 2, and July 4, 1998. The videotape plus the investigator's testimony established that claimant was observed helping another worker build a picnic table; helping the worker load the completed picnic table on a golf cart; lifting and carrying a large cooler; unloading large boxes; and carrying a large bucket in his right hand. The claimant was

observed performing all of these various duties without exhibiting any pain or discomfort in his low back.

Respondent's owner Mr. Corbin testified by deposition in this case. He testified he specifically told claimant at the time the window air conditioner was removed from the window not to carry the air conditioner without another worker's assistance. Mr. Corbin also testified he did not have a history of firing employees and claimant would have been excused at any time he needed to receive medical treatment for his low back. But Mr. Corbin also testified that claimant did not want to go to medical treatment.

Mrs. Corbin also testified in this case at the first regular hearing. She testified that claimant admitted that her husband had instructed him not to carry the air conditioner but he did so anyway. She testified that Mr. Corbin did not fire employees and claimant was allowed to get off work at any time he needed for medical treatment.

Claimant left his employment with respondent in October 1998. He then went to work for D.J. Engineering. On the day of the June 1, 2000, preliminary hearing, claimant was employed by Capps Manufacturing. Claimant worked in the warehouse and finally on the production line for D. J. Engineering. Claimant described his job at Capps Manufacturing as a production job of scribe and grind.

The Board concludes, the evidence as a whole contained in the record, creates doubt as to the truthfulness of claimant's testimony in regard to his low back injury. First, claimant did not have any symptoms in his low back when he first lifted and carried the air conditioner. He first noted symptoms in his low back the next morning. Respondent provided medical treatment for claimant's low back injury from the May 28, 1997, accident date until July 22, 1998. But over this period of time that exceeded one year, claimant was consistently noncompliant with the medical treatment as he missed appointments with the physician assistant, physical therapy and x-ray examinations. Second, claimant testified the reason he carried the air conditioner himself instead of having someone help him and the reason he missed scheduled medical treatment was because he was afraid respondent would fire him. But respondent's owners, Mr. and Mrs. Corbin, both testified they had never fired an employee and they were more than willing to excuse claimant from work for his medical treatment. In fact, Mr. Corbin testified the reason claimant missed medical appointments was because he simply would not go. Third, claimant testified after he was taken off work by Mr. Swim on May 18, 1998, he continued to work but only answered the telephone and worked behind the counter taking money from customers who fished. But the videotape and the investigator's testimony proved that claimant was moving around without pain and was performing physical job duties. Lastly, the Board finds significant that, since the alleged May 28, 1997, work accident, claimant has been able to continue to perform work for respondent and is now capable of performing manufacturing jobs without missing work because of the pain and discomfort in his low back.

The burden of proof, in a workers compensation proceeding, is placed squarely on the worker to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which that right depends.¹ The Board concludes, as did the ALJ, that claimant, in this case, failed to meet that burden of proof and the claimant's request for workers compensation benefits is denied.

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' May 15, 2001, preliminary hearing Order should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2001.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Gary A. Winfrey, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

¹ See K.S.A. 44-501(a) and 44-508(g).